IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
DISCIPLINARY TRIBUNAL

IN THE MATTER OF ATTORNEY CAROLINE BAIRD II,
Respondent.

Cite as: 2021 Palau 17
Disciplinary Proceeding No. 20-004

Hearing Held: June 3, 2021
Decided: June 24, 2021

Disciplinary Counsel ..... Masami Elbelau, Jr.
Counsel for Respondent ..... David C. Angyal

BEFORE: JOHN K. RECHUCHER, Associate Justice
GREGORY DOLIN, Associate Justice
ALEXANDRO C. CASTRO, Associate Justice

OPINION

PER CURIAM:

[¶ 1] This matter comes to us following a disciplinary complaint against Respondent alleging that she violated the Republic of Palau Disciplinary Rules ("Disciplinary Rules"), Rule 2(h), when she failed to maintain proper communications with her client, Ms. Hitomi Motoki, and charged unreasonable fees in violation of the American Bar Association Model Rules of Professional Conduct ("ABA Model Rules") 1.4 and 1.5 respectively. The Complaint alleged six instances of violation of Rule 1.4 and two instances of violation of Rule 1.5.

BACKGROUND

[¶ 2] Sometime in early 2020, Ms. Motoki contacted Respondent for the purposes of engaging her services in a separate dispute that Ms. Motoki had with a local contractor. On February 28, 2021, Ms. Motoki executed a Retainer and Representation Agreement with Respondent and paid, pursuant to that agreement, a retainer in the amount of $5,000. Ms. Motoki and Respondent agreed that Respondent would bill at a rate of $250 per hour and that billing statements would be provided on a "semi-monthly" basis.

[¶ 3] Respondent does not dispute that she failed to provide billing statements on a semi-monthly basis, or for that matter at all, until Ms. Motoki complained that her case against the contractor had stalled. In June 2020, several meetings between Respondent and Ms. Motoki were scheduled and thereafter cancelled. It was not until June 29, 2020, that Respondent informed Ms. Motoki that not only had her entire $5,000 retainer been depleted, but that there was a balance owed. Ms. Motoki requested an explanation as to how her retainer was depleted so quickly and on July 3, 2020, Respondent provided a letter explaining her work on the matter and the first ever billing statement in the amount of $10,981.95 representing 43.5 hours of work and $106.95 in postage and similar expenses. The billing statement indicated that Respondent agreed to provide a $3,000 discount for her services. Even with the discount, according to the billing statement, Ms. Motoki owed Respondent $2,981.95 above and beyond the $5,000 retainer.

[¶ 4] The parties do not dispute that during her representation Respondent prepared, edited, and mailed a demand letter to, and drafted, but never filed, a thirteen count Complaint against Mr. Motoki's contractor. Parties disagree as to the type and amount of other work Respondent claimed to have performed.

[¶ 5] A hearing on the complaint was held on June 3, 2021. At the hearing, Respondent admitted to the violation charged in Count IV of the Complaint which alleged that her "failure to produce a billing statement at regular intervals was a violation of MRPC 1.4." In consideration of her accepting responsibility on Count IV, Disciplinary Counsel agreed to dismiss the remaining allegations of the Complaint. At the hearing, the Tribunal heard Ms. Motoki's "victim impact" statement, and also heard Respondent's description

of her service to the people of Palau both as an attorney and as a member of the community. Thereafter, parties submitted written arguments as to the appropriate sanction for the admitted conduct. Disciplinary Counsel urges that Respondent should be publicly censured (including requiring that the matter be published in newspapers and announced on the radio), be required to reimburse her entire fee to Ms. Motoki, be suspended from the practice of law for two months, and be held liable for Disciplinary Counsel fees. Respondent, on the other hand, argues that lesser sanctions are appropriate and suggests that a private reprimand, a requirement of 10 hours of Continuing Legal Education pertaining to attorney billing and accounting practices, reimbursement of no more than 10% of her fee to Ms. Motoki, and reimbursement of some, but not all of Disciplinary Counsel's fees, would constitute an appropriate sanction.

APPLICABLE STANDARD

[¶ 6] Alleged violations of the Republic of Palau Disciplinary Rules must be proven by clear and convincing evidence. ROP Disc. R. 5(e).[1] "Clear and convincing evidence requires the Tribunal be convinced that the allegations are highly probable or reasonably certain, but falls short of proof beyond a reasonable doubt." *In re Shadel*, 22 ROP 154, 157 (Disc. Proc. 2015). "If the Tribunal finds that the allegations of misconduct are true, it shall impose an appropriate sanction." ROP Disc. R. 5(g).

> In imposing a sanction after a finding of lawyer misconduct, the court . . . shall consider the following factors . . . (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors.

ABA Model R. 10(c).

[1] The Tribunal applies the Rules as they were in effect at the time the complaint was filed.

DISCUSSION

[¶ 7] Because Respondent admitted that she failed to provide timely billing to her client, and further admitted that such behavior constitutes a violation of the Disciplinary Rules, we conclude that the allegations against Respondent contained in Count IV of the Complaint were proven by clear and convincing evidence. We therefore turn to the discussion of appropriate sanction taking into account the factors outlined in Rule 10(c) of the ABA Model Rules.

[¶ 8] We begin by noting that Respondent violated her duty to keep her client abreast of the developments in the case and to permit her client to decide whether continued expenditure of funds was in her interest. This conduct is particularly troubling given that the client was not a fluent English speaker (a fact of which Respondent was aware) and someone not very familiar with the legal system. These limitations make Ms. Motoki a vulnerable victim. At the same time, we agree with Respondent that Ms. Motoki is a competent adult with sufficient understanding of the English language to permit her to make informed decisions. These English language abilities are sufficient to have read and understood the detailed Retainer and Representation Agreement which Respondent provided to Ms. Motoki. Indeed, Ms. Motoki testified that she reviewed the document with her friend and understood it.

[¶ 9] We reject Disciplinary Counsel's argument that Ms. Motoki's vulnerability is enhanced by the mere fact that she is a single mother with two school-aged children or the fact that in the face of the pandemic she lost her income. Obviously, there are plenty of single mothers who are very sophisticated and astute businesswomen, professionals, skilled negotiators, and the like. Though single parents may face unique challenges, this status alone does not make one a vulnerable victim. As to pandemic's effect on Ms. Motoki's finances, we note that Ms. Motoki engaged Respondent's services before the COVID-19 pandemic caused economic shutdowns and loss of employment. Respondent's representation of Ms. Motoki ended in June 2020, also before it was clear that the shutdowns would last for as long as they have. And, of course, Respondent cannot be blamed for the continued financial fallout from the pandemic. Thus, these factors do not contribute to Ms. Motoki's vulnerability as that term is used in the ABA Model Rules.

[¶ 10] Though we do conclude that Ms. Motoki is somewhat vulnerable to being taken advantage of, we do not believe that this case lies at the extreme end of the spectrum. That having been said, we do conclude that Respondent's conduct prejudiced her client and in deciding on a sanction, we must choose one that will, to the maximum extent possible, remedy the injury done and send a message to the Palau Bar that such behavior will not be tolerated.

[¶ 11] Next, we consider Respondent's *mens rea*. We do not believe that Respondent intentionally sought to deprive her client of information. Rather, it appears that Respondent was negligent in her record-keeping and maintaining proper communications with her client. At the June 3, 2021, hearing Respondent testified to a variety of hardships and stresses that she experienced over the last several years including the death of her mother and a physical injury that she herself sustained. These stressors do not absolve Respondent of her responsibility to comply with the rules of professional conduct, but they do convince us that Respondent was not acting with any malice or intentional disregard to her obligations. This factor favors Respondent's position.

[¶ 12] We disagree with Disciplinary Counsel's submission that Respondent acted with a "dishonest or selfish motive." Certainly, Respondent's failure to timely bill her expenses allowed her to avoid the oversight that her client could have otherwise exercised. But if we were to accept Disciplinary Counsel's argument, it would follow that in *any* situation where an attorney fails to timely communicate with his client about the fees being incurred, we would be required to conclude that the attorney acted with a "dishonest or selfish motive." We do not think that such conclusion is warranted. There are situations where an attorney affirmatively seeks to mislead their client so as to enrich themselves while doing little work. And there are situations where an attorney is working quite diligently on the client's case, but is sloppy when it comes to providing their client with timely accounting. Such cases are not the same and the sanction imposed should also not be the same. Having reviewed the entire record, we are convinced that Respondent's conduct falls closer to the latter situation than to the former one.

[¶ 13] Next, we consider "the amount of the actual or potential injury caused by the lawyer's misconduct." ABA Model R. 10(c)(3). Respondent did

perform some work for Ms. Motoki, including drafting and mailing a demand letter, and preparing, though never filing, the complaint against Ms. Motoki's contractor. On the other hand, failure to keep Ms. Motoki abreast of the ongoing costs of Respondent's work prejudiced Ms. Motoki's ability to terminate her agreement with Respondent and to hire a more affordable attorney.[2] In evaluating harm done to Ms. Motoki we considered whether, through Respondent's conduct, Ms. Motoki has lost her ability to pursue her breach of contract claim against her contractor. Because Palau has a six year statute of limitations on breach of contract claims, *see* 14 PNC § 405, and because Ms. Motoki's cause of action accrued, at the earliest, on March 28, 2019, Ms. Motoki remains legally able to pursue this action. Thus, though we conclude that Respondent's actions caused significant harm to her client, we note that the injury is not irreparable.

[¶ 14] Finally, we consider the presence of aggravating and mitigating factors. Respondent testified to her history of service to the people of Palau both as an attorney and as an active member of the community. We take that testimony at face value. Respondent's active involvement in the life of our Republic and her lack of prior history of discipline are mitigating factors. *See In re Doe*, 2021 Palau 12, ¶ 6. The fact that Respondent admitted responsibility for her action also constitutes a mitigating factor.[3] *See, e.g.*, *State ex rel. Couns. for Discipline of Nebraska Supreme Ct. v. Nimmer*, 916 N.W.2d 732, 750 (Neb. 2018) ("An attorney's admission of responsibility for his or her actions reflects positively upon his or her attitude and character and is to be considered in determining the appropriate discipline."). Furthermore, Respondent's offer to continue to represent Ms. Motoki *gratis* through at least

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[2] We are also concerned that the amount of time billed to each task appears to be excessive. Though this count of the Complaint was dismissed, and therefore no finding of liability on that count is made, the seemingly excessive billing informs our evaluation of the harm done to Respondent's client.

[3] Disciplinary Counsel submits that in his opinion the apology was "[n]either heartfelt [n]or credible," and "did not appear to contain a genuine expression of regret (nor empathy), a credible explanation of what went wrong, an acknowledgment of responsibility, a declaration of repentance, an offer of repair, or a request for forgiveness." We disagree with this characterization. And although Respondent's statement may have been "mostly rambling [and] stream-of-consciousness," the Tribunal notes that Respondent was making her statement from the United Kingdom where it was middle of the night at the time the hearing was taking place in Palau.

the summary judgment stage in the potential lawsuit against Ms. Motoki's contractor indicates that Respondent is willing to make an appropriate effort to rectify the harm caused.[4] We view this willingness as another mitigating factor.

[¶ 15] On the other hand, contemporaneously with her admission of liability in the present case, Respondent also admitted to violations in another matter. *See In re Baird I*, 2021 Palau 16. In that case, Respondent admitted to negligently failing to follow the rules regarding attorney advertising, maintaining proper communications with a client, and inaccuracies in her application for admission to the Palau bar. These multiple violations establish a pattern of misconduct which is an aggravating factor. We do note that although there is a pattern of negligent behavior, the misconduct was not egregious and though multiple violations do constitute an aggravating factor, given that here, like in *Baird I*, the harm to Respondent's clients and the public was not grave or irreparable, we do not weigh this factor very heavily.

[¶ 16] Ultimately, in deciding on the appropriate sanction, our goal "is not punishment but the protection of the public and the courts from attorneys who are failing to either adhere to required standards of conduct or to discharge properly their professional duties." *In re Wolff*, 6 ROP Intrm. 205, 216 (1997). Ms. Motoki is one of the members of the public that deserves to be protected from Respondent's inappropriate conduct. We therefore choose the sanction with that goal in mind.

[¶ 17] In crafting an appropriate sanction, we seek to right the wrong done by Respondent's conduct. Although Ms. Motoki testified about hardships that she is suffering as a result of her contractor not completing the agreed-upon project, that hardship is not due to any actions by Attorney Baird. In other words, had Ms. Motoki never hired Respondent as her attorney, her position vis-à-vis her contractor would have remained the same. Thus, while we are sympathetic to Ms. Motoki's predicament as it comes to her underlying claim of breach of contract, we do not take it into account in deciding on the appropriate sanction in this case. Instead, we attempt to restore Ms. Motoki to

[4] In light of this offer, we reject Disciplinary Counsel's argument that Respondent "made no offers of restitution during her statement."

the position she would have been in had Respondent lived up to her professional obligations.

[¶ 18] Having reviewed the work conducted by Respondent on behalf of Ms. Motoki, and her billing statements, we conclude that had Respondent provided Ms. Motoki with timely invoices, Ms. Motoki would have likely taken stock of the high fees that Respondent was charging and would have had the opportunity to consider whether to continue with Respondent's representation. Thus, in order to put Ms. Motoki in the same position she would have been in had Respondent not violated her duties, we view the world as it would have been at about the time that Respondent sent the demand letter to Ms. Motoki's contractor. We believe that a fee of $1,000 up until that point would have been a reasonable one. Any fees spent beyond that initial $1,000 were spent in violation of ABA Model Rule 1.4(a)(3) and must therefore be refunded to Ms. Motoki. Although our Disciplinary Rules do not directly speak to restitution, *see* ROP Disc. R. 3, we have previously employed this remedy. *See In re Kalscheur*, 19 ROP 179 (Disc. Proc. 2012). Accordingly, we order Attorney Baird to pay restitution in the amount of $4,000 to Ms. Motoki.

[¶ 19] Respondent's argument that restitution would be inappropriate because the conduct stipulated to, did not involve misappropriation of client's funds misses the mark. Failure to timely bill Ms. Motoki deprived her of the ability to decide whether or not Respondent's services are worth it given their price. As a result, the work that Respondent did following the sending of the demand letter, was not authorized by her client and consequently there is no reason for the client to be financially liable for such work. *Cf. Smith v. Dendinger*, 349 So. 2d 907, 909 (La. Ct. App. 1977) (affirming an order reducing attorney fees where the trial court concluded that not "all of the work was authorized or was necessary.").

[¶ 20] We note again that Respondent agreed to continue representing Ms. Motoki in her lawsuit against Ms. Motoki's contractor through the motion for summary judgment and to undertake such work *gratis*. Of course, we cannot direct Ms. Motoki to accept Respondent as her lawyer. However, to the extent that Ms. Motoki is willing to accept Respondent's offer, the restitution order

will be abated and substituted for community service, *see* ROP Disc. R. 3(f), said service consisting of representing Ms. Motoki as described above.[5]

[¶ 21] As with most "cases which do not result in dismissal," we also assess "[t]he cost of investigating and prosecuting th[is] action . . . against the respondent attorney." Because the dismissal of Counts I-III and V-VIII were dismissed not on the merits, but as a result of a "plea bargain," Respondent shall bear the costs associated with investigating and prosecuting not only Count IV, but these dismissed counts as well.[6] *See In re Baird I*, 2021 Palau 16, ¶ 25.

[¶ 22] We do not believe that the imposition of either public or private censure is warranted, if for no other reason than the fact that this opinion will be published, and both the Palau Bar and the public will be made aware of Respondent's misconduct and the sanctions imposed.[7] Respondent's suggestion that she be required to undertake 10 hours of CLEs pertaining to attorney billing and accounting practices in lieu of monetary penalties is not well taken. Respondent has been ordered to take 10 hours of such CLEs in the companion disciplinary case, *see Baird I*, 2021 Palau 16, ¶ 27(2), and we do not believe that ordering *another* 10 hours of CLEs on substantially the same topic would provide significant additional protection to the public that attorney discipline is meant to accomplish. Finally, we do not believe that suspension from practice is necessary in this case. Suspension is the harshest punishment, short of disbarment, that the Tribunal can impose, *see* ROP Disc. R. 3, and we

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[5] It goes without saying that should this option be chosen, Respondent must adhere to all of the professional standards in her representation of Ms. Motoki. Failure to do so will be grounds for additional, and harsher, discipline.

[6] Respondent argues that Disciplinary Counsel, through refusal to timely communicate or timely engage in substantive discussions regarding settlement and stipulation of certain facts "piled on" fees that could have been avoided. If that is so, Respondent is welcome to file objections to Disciplinary Counsel's requested fees by identifying which fees Respondent believes were unnecessarily incurred. At present, we express no opinion on whether such objections, if lodged, will be sustained.

[7] We also decline Disciplinary Counsel's suggestion that this matter be published in newspapers and announced on the radio. The media is, of course, free to report on this (or any other) decision, but the Disciplinary Tribunal, like all other courts of the Republic, speaks through its written opinions and not newspaper announcements.

simply do not believe that the present case is sufficiently egregious to warrant the imposition of such a significant sanction.

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[¶ 23] We close by saying that none of us relish adjudicating disciplinary proceedings where we have to sit in judgment of the behavior of fellow attorneys. As both Ms. Motoki and Respondent noted, these cases impose additional strain on victims of attorneys' misbehavior, on attorneys themselves, on families of everyone involved, and frankly on members of the Tribunal, for it requires us to punish a member of our learned fraternity. Lawyers, of course, are human, and as any human, lawyers make mistakes. Opportunities for mistakes proliferate when lawyers (like any other human) labor under added stress whether because of a pandemic, family issues, medical problems, or other stressors common to all of us. However, when mistakes are made it is a far better approach to acknowledge them early on and attempt to repair the damage caused. Admittedly, that is not always easy to do. It is a normal human tendency to get defensive whenever one is accused of misconduct. But attorneys, as members of a learned profession, are held to a higher standard and we expect them to do things that are not always easy. These entire proceedings could have been easily avoided had Respondent been willing, earlier on, to either refund Ms. Motoki's money or to finish working on her case without seeking extra fees. We hope that both Respondent and other attorneys in our Republic take this lesson to heart.

CONCLUSION

[¶ 24] Respondent Caroline Baird is **ADJUDGED** as having failed "to produce a billing statement at regular intervals," and is therefore **ADJUDGED RESPONSIBLE** for violating Disciplinary Rule 2(h) in that she committed an act "which violates the American Bar Association Model Rules of Professional Conduct," specifically ABA Model Rule 1.4(a)(3) which requires an attorney to "keep the client reasonably informed about the status of the matter."

[¶ 25] In light of the above finding, the Tribunal **SANCTIONS** the Respondent as follows:

1) Within 45 days, Respondent **SHALL PAY RESTITUTION** in the amount of $4,000 to Ms. Hitomi Motoki;

2) **AS AN ALTERNATIVE TO THE ORDER OF RESTITUTION**, and upon written consent of Ms. Hitomi Motoki, Respondent **SHALL PERFORM COMMUNITY SERVICE** consisting of continued and *gratis* representation of Ms. Motoki in the breach of contract claim against Ms. Motoki's contractor through at least the summary judgment stage of those proceedings. Should this option be chosen, Respondent **SHALL FILE WITH THE TRIBUNAL**, within 45 days of this opinion, Ms. Motoki's written consent to such an arrangement;

3) Respondent **SHALL PAY THE COST** of investigating and prosecuting this action.

Disciplinary Counsel **IS INVITED** to submit his statement of fees and costs to Respondent and the Tribunal within 15 days of this opinion. Following the submission, Respondent shall have seven days to file any objections to Disciplinary Counsel's submissions. Upon reviewing Disciplinary Counsel's submissions and any objections lodged by Respondent, the Tribunal will issue a separate order fixing the total costs and fees to be borne by Respondent.